Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	**WC Docket No. 17-108**
Restoring Internet Freedom	)	

COMMENTS OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA

The Government of the District of Columbia, acting through its Office of Chief Technology Officer ("the District), submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in this docket. For the reasons set forth below, the District urges the Commission to maintain its current rules protecting the free and open Internet, including its classification of Broadband Internet Access Service ("BIAS") as a Title II "telecommunications service."[1]

I. INTRODUCTION

As the Commission observes in the opening paragraph of the NPRM, "Americans cherish a free and open Internet." That is so because the Internet, like electricity a century ago, has increasingly become a general-purpose platform and driver of simultaneous progress in just about every field that matters to Americans. This includes economic development and global competitiveness, education, public safety, health care, transportation, energy, environmental

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[1] *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015), 2017 WL 2292181 (F.C.C.). Following the Commission lead in the NPRM, the District will refer to this order as the "*Title II Order.*"

protection, government service, scientific research, entertainment, democratic discourse, and much more.

To take full advantage of the Internet, American communities, businesses, institutions, and residents must have unfettered access to it, in accordance with the principles that the United States Conference of Mayors articulated in 2014:

- Commitment to transparency;
- The free flow of information over the Internet;
- No blocking of lawful websites;
- No unreasonable discrimination of lawful network traffic; and
- No paid prioritization[2]

These principles are in most respects similar to the four "Internet Freedoms" that the Commission unanimously endorsed in 2005.[3] These freedoms included "the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information."[4]

In the NPRM, the Commission states that it is seeking to "restore" the Internet Freedoms.[5] Similarly, industry opponents of the *Title II Order* express a willingness to comply

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2 On July 12, 2017, District of Columbia Mayor Muriel Bowser joined with the mayors of 50 other cities in writing a letter to FCC Chairman Ajit Pai in support of Network Neutrality that, among other things, cited these principles. The letter is available online at https://goo.gl/fthdbj. The District incorporates the letter by reference and supplements it with these comments.

3 NPRM, at ¶¶ 13-15, citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

4 NPRM, at ¶ 13, citing the *Internet Policy Statement*.

5 NPRM, at ¶ 71 ("Below, we explore the best method to restore the long-standing consensus under both Democratic and Republican-led Commissions, represented by the four Internet Freedoms, that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service, all without deterring the investment and innovation that has allowed the Internet to flourish.")

with the specific principles and rules that the FCC adopted in that order, but they take issue with the Commission's reliance upon Title II to support these principles and rules.

For example, in upholding the *Title II Order*, the D.C. Circuit observed, "US Telecom contends that the Commission lacked good reasons for reclassifying broadband because 'as Verizon made clear, and as the [Commission] originally recognized, it could have adopted appropriate Open Internet rules based upon § 706 without reclassifying broadband.'"[6] Likewise, several major Internet service providers have recently supported the principles and rules established by the *Title II Order* while opposing the reclassification provisions of that order.

Thus, in its response to the Day of Action in Support of An Open Internet, which was held on July 12, 2017, AT&T stated:

> AT&T has long embraced this bipartisan regulatory approach because it has advanced internet freedom and openness without sacrificing innovation, investment and rapid growth throughout our nation's online ecosystem. With its 2010 Open Internet Order, the FCC tackled the core issues of blocking, throttling, and anti-competitive paid prioritization that stood at the center of the open internet debate and addressed the prominent concerns of online consumers.
>
> Unfortunately, in 2015, then-FCC Chairman Wheeler abandoned this carefully crafted framework and instead decided to subject broadband service to an 80-year- old law designed to set rates in the rotary-dial-telephone era. Saddling modern broadband infrastructure and investment decisions with heavy-handed, outdated telephone regulations creates an environment of market uncertainty that does little to advance internet openness. Instead, it jeopardizes the prospects for continued innovation and robust growth we have witnessed since the internet's creation.[7]

Likewise, Verizon stated:

> Like those participating in the Day of Action, Verizon supports the open Internet. We've said so for a long time now – the open Internet is good for consumers and critical for our business. … But it is important to distinguish agreement on a goal from honest debate on the best means to achieve that goal. … [W]hile we agree with the goal of an open Internet, we do not think the answer is to impose 1930s

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6 *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016) ("*USTA v. FCC*"), quoting US Telecom Petitioner's Brief at 54 (internal citations omitted)."

7 AT&T Public Policy Blog, "Why We're Joining 'The Day of Action' In Support of an Open Internet," July 11, 2017, https://goo.gl/kmDQnX.

> utility regulation on ISPs. Regulation designed for rotary phones and monopoly railroads doesn't fit today's competitive Internet space. And the early experience with the FCC applying Title II regulation to broadband has already revealed the risks. … It's in all of our interests to ensure that consumers can access the legal content of their choice when and how they want. It also is in all of our interests for businesses to have certainty so they can invest in networks and create new products and offers with confidence. And providers throughout the Internet ecosystem should be able to expand and grow their networks and services without fear of being cut-short by regulation.[8]

For its part, Comcast went even further:

> We wanted to reinforce today – to the public, our customers, regulators, and legislators -- what we've been saying and doing for years. We support permanent, strong, legally enforceable net neutrality rules. We don't and won't block, throttle, or discriminate against lawful content. We also believe in full transparency; you'll know what our customer policies are.
>
> But as we have consistently pointed out, Title II regulation and net neutrality are not the same thing.[9]

In sum, the key industry stakeholders in the Net Neutrality debate claim to be willing to comply with the specific rules and principles that the Commission adopted in its *Title II Order* but they object to the Commission's reliance upon Title II to support those rules and principles. Unfortunately, the issues at stake are too important to simply rely on the good intentions of industry and market forces alone. Instead, the Commission must have a solid regulatory framework and enforcement process to ensure compliance, and Title II classification is the only means under which that can be accomplished under the Commission's existing statutory authority.

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8 Verizon Public Policy Blog, "A time for real action," July 12, 2017, https://goo.gl/f99DTj

9 ComcastVoices, "Comcast Supports Net Neutrality on the Internet Day of Action," July 12, 2017, https://goo.gl/SnyLdS, citing ComcastVoices, "Comcast Supports Net Neutrality and Reversal of Title II Classification. Title II Is Not Net Neutrality," April 26, 2017, https://goo.gl/CykG8S.

II. THE COMMISSION'S TITLE II RECLASSIFICATION WAS ESSENTIAL IN 2015 AND REMAINS SO TODAY

A. Only By Treating BIAS as a Title II "Telecommunications Service" Can the Commission Enforce Its Open Internet Rules and Principles

As shown, the fight over Net Neutrality today is not about the specific rules and principles that the FCC adopted in its *Title II Order*. It is about the Commission's decision to rely upon Title II to support these rules. In this section, we show that Title II reclassification was essential, and remains essential, and that the Commission's concerns reflected in the NPRM are misplaced.

In its statement quoted earlier at page 4, Comcast underscored the key issue that the Commission should address in this proceeding – the critical need for "permanent, strong, *legally enforceable* net neutrality rules" (emphasis added). Unless and until the federal communications laws are amended, that goal can only be met by treating BIAS as a Title II "telecommunications service." Simply put, under existing law, the only viable and enforceable means of establishing Net Neutrality available to the Commission is to treat BIAS as a "telecommunications service" subject to Title II.

As the D.C. Circuit observed in upholding the *Title II Order*, the Commission in prior cases advanced a variety of legal theories to support its open Internet rules and principles, and they all failed as a matter of law until the Commission reclassified BIAS as a Title II "telecommunications service." More specifically, as the D.C. Circuit held in the *Comcast* case,[10] the Commission could not treat BIAS as an "information service" and enforce its *Internet Policy Statement* against Comcast pursuant to its "ancillary jurisdiction" under Section 4(i) of the Communications Act, as the Commission had "failed to identify any grant of statutory authority

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10 *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) ("*Comcast*").

to which the order was reasonably ancillary."[11] When the Commission subsequently invoked Section 706 of the Telecommunications Act, 47 U.S.C. § 1302, as authority for its anti-blocking and anti-discrimination rules, the Court invalidated those rules because they imposed common carrier requirements on providers of "information services," in violation of Section 3(51) of the Communications Act, 47 U.S.C. § 153(51).[12] Only when the Commission finally classified BIAS as a Title II telecommunications service did the D.C. Circuit at last uphold the Commission's rules and principles.

Against this backdrop, it would be against the public interest, arbitrary, capricious, and irrational for the Commission to reverse the reclassification provisions of the *Title II Order* and revert to treating BIAS as an "information service." In the face of *Comcast* and *Verizon*, doing so would effectively deprive the Commission of any authority to enforce the specific rules and principles that the Commission seeks to "restore." That is hardly a sensible way to achieve "permanent, strong, legally enforceable net neutrality rules," as Comcast put it.

B. The Commission's Concerns About Treating BIAS As a Title II Telecommunications Service Are Unwarranted

In the NPRM, the Commission invites comments on several issues that may yield insights on the practical effects of treating BIAS as Title II telecommunications service. None of these issues justifies reversal of the *Title II Order*.

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11 *USTA v. FCC*, 824 F.3d at 693, citing *Comcast*, 600 F.3d at 644.

12 *USTA v. FCC*, 824 F.3d at 695 ("As we explained, the Communications Act provides that "[a] telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services." [*Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) ("*Verizon*")] (quoting 47 U.S.C. § 153(51)). The Commission, however, had classified broadband not as a telecommunications service, but rather as an information service, exempt from common carrier regulation. *Id. Because the anti-blocking and anti-discrimination rules required broadband providers to offer service indiscriminately—the common law test for a per se common carrier obligation—they ran afoul of the Communications Act. See id.* at 651–52, 655, 658–59.") (our emphasis added).

First, the Commission suggests that the *Title II Order* has caused investment in broadband networks to decline, particularly in rural, low-income, and other underserved communities.[13] But the Commission does not provide sufficient and demonstrable evidence of widespread or pervasive negative impacts caused by the reclassification of BIAS that would warrant a reversal of the regulatory classification. Indeed, the Commission cites evidence that has been presented by parties on both sides of this issue, demonstrating that the available record is far from conclusive. Given the many factors that go into broadband investment decisions, most of which have nothing to do with the *Title II Order*, we think it highly unlikely that the Commission will be able to draw any meaningful and supportable cause-effect conclusions. Furthermore, we urge the Commission to step back and focus on the fundamental flaws in its analysis of this issue.

First, according to the Commission, preventative regulation is unnecessary because Internet service providers have been complying, and will continue to comply, with the specific rules and principles set forth in the *Title II Order*. If this is true, however, then the reclassification portions of *Title II Order* could not have had any adverse effect on the providers' past broadband investment decisions, nor will they have any impact on future broadband investment decisions.

Second, the Commission suggests in the first paragraph of the NPRM that the *Title II Order* somehow reversed the "light-touch regulatory approach" that enabled the Internet to "flourish" for nearly twenty years. But this ignores the fact that the *Title II Order* itself adopted a "light-touch" regulatory approach that only applied nominal common carrier regulations to BIAS. Indeed, as the Commission notes in the NPRM, "[i]n the *Title II Order*, the Commission, on its own motion, forbore either in whole or in part on a permanent or temporary

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13 NPRM, at ¶ 4.

basis from 30 separate sections of Title II as well as from other provisions of the Act and Commission rules."[14] Through such forbearance, the Commission continued its "light-touch regulatory approach," while ensuring through its reclassification of BIAS as a Title II service that the Commission would be able to enforce its rules and principles, if and when necessary. Adopting the Commission's current proposal to reverse the reclassification provisions of the *Title II Order* would in effect turn the Commission's "light-touch regulatory approach" into a "no-touch regulatory approach," leaving the Commission helpless to address violations of its rules and principles, and harming consumers.

Third, at various points in the NPRM, the Commission suggests that the *Title II Order* imposes "utility-type regulation" on Internet service providers, which represents "a massive and unprecedented shift in favor of government control of the Internet."[15] These exaggerated assertions cannot be reconciled with the Commission's statements elsewhere that the rules and principles actually adopted in the *Title II Order* are appropriate and that Internet service providers are generally complying with them today and will continue to do so in the future.

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14 NPRM, at ¶ 33.

15 NPRM, at ¶ 3.

Fourth, even if some of the specific rules and principles in the *Title II Order* imposed some additional compliance costs in particular circumstances for individual or groups of service providers, that would not justify taking an axe to the *Title II Order*. As the Commission has demonstrated, it can readily make adjustments to its rules when it chooses to do so. For example, in response to complaints that the Commission's enhanced transparency rules were too costly and burdensome for small Internet service providers, the Commission exempted providers with fewer than 250,000 subscribers from these rules for a period of five years.[16]

Fifth, major broadband projects are highly capital intensive and long-term endeavors that require a stable regulatory environment. The Commission is certainly justified in seeking to avoid rules that could create regulatory uncertainty that would jeopardize broadband investments. But, reversing the *Title II Order* now for anything other than compelling reasons, to remove demonstrable harms, would be counterproductive, as it would send potential investors the message that with every presidential election, major policy changes might put their investments at risk.

In short, unless and until Congress changes the current statutory scheme, retaining the Commission's reclassification decision in the *Title II Order* is the only means to protect the vital public interest served by the Net Neutrality rules. Thus, the current reclassification framework itself serves a vital purpose – enabling the Commission to enforce its open Internet rules and principles. Conversely, reversing that classification decision would serve no useful or valid purpose, and it would undercut the Net Neutrality rules.

III. NO COMPELLING REASONS EXIST TO REVERSE THE *TITLE II ORDER*

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16 FCC, *In the Matter of Small Business Exemption From Open Internet Enhanced Transparency Requirements*, Order, GN Docket No. 14-28, 339 (F.C.C.), 2017 WL 840968.

> As US Telecom points out, the Supreme Court has held that "the [Administrative Procedure Act] requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.'"[17]

This is particularly important in this case because the D.C. Circuit carefully examined each of the Commission's main findings in the *Title II Order* and determined that those findings met the heightened standard. Further, the District is unaware of any changes in the facts that would be significant enough to warrant reversal of the *Title II Order*.

IV. CONCLUSION

For all of the foregoing reasons, the District urges the Commission to maintain its current open Internet rules and principles, including its decision in the *Title II Orde*r to treat BIAS as a Title II telecommunications service.

Respectfully submitted,

Archana Vemulapalli
Chief Technology Officer
Washington, D.C.
Office of Chief Technology Officer
200 I Street, SE
Washington, DC 20003
(202) 727-7255

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17 *USTA v. FCC*, 825 F.3d at 707 (citations omitted).